

Coty, Asics and Google Shopping:

Practical Implications for Distribution Strategy

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Outline

I. Coty

II. Asics

III. Google Shopping

Coty facts

- Coty runs a selective distribution system (SDS) for cosmetics/perfumes and applies criteria to support its luxury image
- Under amended rules:
 - online sales from authorised retailer's own online store permitted provided luxury character of products preserved
 - authorised retailers must sell online under their own name and may not engage an unauthorised third party in a manner discernible to the public
- Parfümerie Akzentze refuses to sign up to amended rules; sells through Amazon; Coty sues
- First instance court finds against Coty on platform restriction, citing *Pierre Fabre*. OLG Frankfurt refers questions on SDS and platform restriction to the ECJ

Coty - First issue: what types of product justify SDS?

- Under established case law, SDS justified where:
 - Needed to preserve the quality or ensure proper use of a product (*Metro*)
 - Promotes non-price competition : e.g., between outlets providing specialist services for high quality and high technology products (*AEG*)
 - Prevents damage to the prestigious image of luxury products, which for consumers is part of their quality, that may result from sales in inappropriate selling environments (*Leclerc*; trade mark law: *Copad*)
- *Pierre Fabre*:
 - «the aim of maintaining a prestigious image is not a legitimate aim for restricting competition ». Did this overturn previous case law for luxury products?

Coty SDS

- **Nature of luxury products justifies use of SDS under Article 101(1) TFEU to preserve their luxury image**
 - Court affirms pre-Pierre Fabre type of justification specific to luxury products
 - Quality of luxury goods includes their allure and prestigious image; sales in inappropriate types of stores may damage this allure/image and thereby their quality
 - Court distinguishes *Pierre Fabre* (*protecting prestige not legitimate aim for restricting competition*): different context of absolute internet sales prohibition; and non-luxury goods (cosmetics and body care products).

Coty - Second issue: platform restriction

- No prior EU guidance/case law on application of Article 101
- Commission considers platform ban to be block exempted
 - Vertical Guidelines, para. 54
 - E-Commerce sector inquiry report – platforms not key as 90% of surveyed retailers sell through own stores
- Conflicting case law at national level, within Germany

Coty platform restriction: Art 101

- **Prohibition on selling Coty goods on third party platforms (3PP) in a manner discernible to consumers where it is intended to ensure the luxury image of those goods is compatible with Article 101(1)**
 - The restriction must meet the *Metro* criteria : it must be (objectively) qualitative, uniform, non-discriminatory and proportionate
 - As the objective of protecting the luxury image was legitimate, the focus was on whether the platform ban was proportionate. It is proportionate because:
 - It is appropriate in order to ensure that:
 - Coty goods are associated exclusively with authorised distributors (*the essence of SDS*);
 - all online sales of Coty goods meet qualitative requirements (Coty has no rights against platform; imposing quality criteria on 3PPs through authorised retailers not as effective);
 - Coty goods are not sold where all kinds of goods are sold (risks undermining luxury)
 - It does not go beyond what is necessary (limited effects on online sales):
 - Not absolute prohibition on online sales (or even on undiscernible platform sales);
 - E-commerce report> most distributors sell through own online shops

Coty platform restriction: VABER

- **Prohibition on selling Coty goods on 3PPs in this manner is, in any event, exempted by the Vertical Agreements Block Exemption (VABER)**
 - Only relevant where 3PP ban restricts competition under Art. 101
 - Not a ban on online sales (distinguishes *Pierre Fabre*)
 - Not a customer restriction and does not restrict passive sales to end users :
 - No identifiable group of 3PP customers to whom sales restricted
 - Distributors can advertise online, e.g., via online third-party platforms and search engines, enabling consumers to find retailers' own stores

Take aways from Coty

VABER: platform restriction

- Platform restrictions (in any system) benefit from the VABER. No indication this is limited to luxury products (based on limited effect, not objective justification)
- It cannot be assumed the same conclusion necessarily applies to internet advertising restrictions (absence of such restrictions emphasised by ECJ)
- Vertical Guidelines require equivalence of on- and off-line restrictions. Is this right if retailer can nonetheless effectively sell online?

Article 101(1): platform restriction

- Position clear for luxury products in SDS: no infringement
- Position not resolved for other products in SDS, but a key issue will be whether the product justifies the use of SDS
 - If it does not, question probably moot
 - If it does, the Coty reasoning may well apply by analogy (no association with unauthorised retailers; no direct contractual rights of supplier to enforce criteria)
- Even if Coty test not met, is it a restriction by object or is a market assessment required to establish effects?

Take aways from Coty (2)

Article 101(1): SDS

- As VABER applies broadly to SDS, how often is a 101(1) analysis key?
- Nothing has changed for luxury products (whatever they may be): nature of product justifies use of SDS under 101(1)
- Ruling not relevant for other products
- Original case law refers to quality not luxury
 - SDS should be a legitimate means to protect a reputation for quality more generally, and not only a reputation for luxury
- In any event, are different types of brand image not equally worthy of protection (lifestyle, environmental, etc?)

Asics facts & background

- **Asics' Distribution System 1.0**
 - Includes Internet specific restraints, such as no price comparison sites (PCS), no use of Asics brand name in search engines and for advertising on third party platforms
- **German Bundeskartellamt: Distribution System violates Article 101 TFEU because of PCS, search engine & advertising prohibition (2015)**
 - PCS ban and search engine/advertising ban are object restrictions under Article 101 (1)
 - Hard core restraints under Article 4(c) VABER
 - Not objectively justified, no efficiency justification
 - Critical of other restraints, but not included in Decision
- **OLG Düsseldorf affirms (2017)**
 - PCS bans are restriction by object (freedom of distributors, price competition) under Article 101 (1) as they are not justified in light of the nature of the products – *Pierre Fabre*
 - No luxury or complex products, PCSs not detrimental to image of brand
 - Hard core restraint under VABER: passive sales restriction à la *Pierre Fabre* (irrelevant that only partial ban and not total ban of internet sales)
 - No leave to appeal (no open legal questions to be clarified)

Asics - Supreme Court (2017)

- **Challenge of denial of leave to appeal**
 - Limited to appeal court finding that VABER does not apply to PCS ban
 - No challenge of Article 101(1) TFEU infringement finding
 - Narrow scope of review
- **Supreme Court rejects appeal – no need to clarify whether PCS ban is blacklisted under Article 4(c) VABER**
 - No doubt about correct answer, no different views (including in Commission's e-commerce Report)
 - At least total PCS ban (not qualitative criteria applicable to PCSs) is hardcore
 - Substantial restraint of online retailers' ability to reach potential customers
- **No questions under EU law in light of Coty**
 - Coty concerned luxury products, not “regular” branded products
 - Asics restraints went beyond Coty restraints (e.g., prohibition of use of Asics trademark on third-party sites)
 - In practice, no longer guaranteed that customers have access to internet offering to a substantial extent

Asics - Questions

- Luxury products v. branded products - meaningful difference?
- Stricter approach to PCSs than to 3PPs under Article 101(1) TFEU?
 - Would PCS restraints based on qualitative criteria be treated differently?
- Under VABER, how can PCSs ban restrict effective internet selling (and be considered hard-core), when 3PP ban does not?
 - Would “pure” PCS ban, without search engine/advertising restraint be permissible under VABER?
- Can additional restraints imposed by Asics be relevant under VABER evaluation?
 - VABER needs predictable black and white rules, not case-by-case assessment of actual/potential impact

Google Shopping

- Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27/06/2017
- Not about restrictions imposed in distribution systems, but about alleged effect of Google's unilateral conduct in general search service market on its competitors in shopping comparison services market
- Key point for Coty/Asics: Commission market analysis
 - Ultimate “victims” of restrictions imposed by Coty and Asics do not compete in same market
 - Fundamental distinction between shopping comparison services and merchant platforms (Amazon, Fnac, etc. do not compete with Google Shopping)
- Unlike comparison websites, the activities of merchant platforms closely resemble those of retailers, even if the platform is not *legally* the seller
 - The platform acts as a place where retailers and consumers can conclude sales
 - Platforms are perceived by both users and comparison shopping services as ‘final destination’ multi-brand retailers
 - Platforms typically offer after-sales support
- Unlike PCs, merchant platforms do not attract traffic to the merchant's own website by including its prices in a general comparison function
 - they are instead customers of PCs

Link to Coty and Asics findings?

- Could be said to be consistent with the different outcomes in Coty and Asics
 - It is legitimate to prevent sales over platforms as they are in effect unauthorised retailers – it is the basic premise of SDS that the supplier should be able to decide who is part of distribution system.
 - Justification for preventing authorised retailers from using comparison websites may be seen as less obvious as any sale following use of a PCS takes place in the authorised retailer's own webstore

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